SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1653

SUMMA CORPORATION and HOWARD R. HUGHES,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

The petition herein seeks review of a decision by the Supreme Court of the State of Delaware entered on February 26, 1975 [App. 21a *et seq.**] on which rehearing was denied on April 1, 1975 [App. 37a] and which is reported at 336 A.2d 572. The decision of the Supreme Court of Delaware affirmed the opinion [App. 1a *et seq.*], reported at 317 A.2d 114, and order [App. 18a-20a] of the Court of Chancery of the State of Delaware which (1) denied petitioners' motion to dismiss the complaint on

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* Citations to "App. ——a" are to pages of the Appendix to the petition; references to "Del.App. A——" are to Appellants' Appendix in the Supreme Court of Delaware; references to "TWA App. A——" are to TWA's Appendix in the Supreme Court of Delaware.

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grounds of *res judicata* and of immunity arising from orders of the Civil Aeronautics Board ("CAB"), and (2) granted the several motions of respondent Trans World Airlines, Inc. ("TWA") and certain third party defendants to dismiss the counterclaims of Hughes Tool Company* on the ground that identical counterclaims had been dismissed with express prejudice in the prior federal action.

No review is sought as to so much of the decision of the Delaware Supreme Court as affirmed denial of petitioners' motion to dismiss grounded upon asserted CAB immunity [App. 32a-35a, 336 A.2d at 578-79] and dismissal of Toolco's counterclaims [App. 35a-36a, 336 A.2d at 579-80].

Question Presented

When a federal court judgment has dismissed a private antitrust suit on the ground that relief under the antitrust laws is unavailable to plaintiff since the transactions complained of occurred in the course of exercise by defendant of a control over plaintiff authorized by the CAB, do judicial doctrines of finality compel a state court to deny all relief under common law principles governing self-dealing, misappropriation of corporate opportunities and breaches of fiduciary duty arising from the same transactions?

Counter-Statement of the Case

This action was instituted on April 18, 1962 for an accounting by Hughes and Toolco for breach of their

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* Hughes Tool Company changed its name to Summa Corporation in late 1972, but herein, as below, we will refer to it as "Toolco."

fiduciary duties to TWA, and to TWA's minority shareholders, during a period when petitioners were in control of TWA. Following a decision by the Delaware Supreme Court upholding sequestration of Hughes's stock in Toolco, *Hughes* v. *Trans World Airlines, Inc.*, 40 Del. Ch. 552, 185 A.2d 886 (Sup. Ct. 1962), and the Court of Chancery's denial of Hughes's motion to dismiss for failure to state a claim, from which no appeal was taken, the Delaware action was informally stayed, *at petitioners' urging* [TWA App. A4-A5], because it then seemed probable that TWA's antitrust claims would be fully adjudicated and all its injuries compensated in the federal action. Indeed, following this Court's 1965 dismissal of certiorari with respect to the interlocutory default judgment against Toolco in the federal action, 380 U.S. 248, damage hearings before Special Master Herbert Brownell resulted in a finding—confirmed by the federal district court, 308 F.Supp. 679 (1969), and the Court of Appeals for the Second Circuit, 449 F.2d 51 (1971)—that TWA had suffered substantial injuries in an amount in excess of $45 million actual damages. The correctness of this finding was presented to but not decided by this Court when it directed that the federal action be dismissed in 1973. 409 U.S. 363, 389.

Petitioners suggest here, as they explicitly asserted below, that TWA has had its day in court in the federal action and therefore the Delaware courts cannot permit TWA to seek redress for its substantial injuries under its common law claims, which have been pending in the Delaware courts since 1962. But TWA has not had its day in court, and if petitioners prevail here, the only remaining forum where TWA may seek such relief—indeed, the only forum ever in which Hughes can be called to account

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personally for his stewardship of TWA*—will be denied to it.

In the federal action, Toolco moved to dismiss the complaint on the ground (also asserted in its answer) that CAB orders approving its acquisition of control of TWA were a bar to the antitrust action. That motion to dismiss was held in abeyance at Toolco's request for well over a year, and was not brought on for argument until February 6, 1963. At that time, relying upon the view then generally accepted as to the limits of such CAB approval, the district court denied the motion. 214 F.Supp. 106. Subsequently, Toolco defaulted, and on appeal from the resulting interlocutory judgment the decision of the district court was unanimously affirmed by the Court of Appeals. 332 F.2d 602 (1964). This Court first granted certiorari, 379 U.S. 912 (1964), but after full briefing and argument (which included a brief *amicus* presented by the CAB supporting TWA's position) it dismissed certiorari as having been improvidently granted. 380 U.S. 248 (1965).

Eight years later, however, this Court held, on appeal from the judgment eventually entered in TWA's favor, that the defense based on CAB orders should have been upheld after all. 409 U.S. 363, 366 (1973). The motion to dismiss made at the outset of the litigation should have been granted. Accordingly, the Court directed that, following remand, the complaint should be dismissed (*id.* at 389). The Court expressly found it unnecessary to reach any of

* Hughes was never personally subjected to any claim whatever in the federal courts; he successfully avoided service of process throughout. Whatever rights to bar TWA's Delaware claims Toolco may be able to claim, Hughes is not entitled to assert the prior federal court judgment as a bar to TWA's Delaware law claims against him. *Kern* v. *Hettinger,* 303 F.2d 333, 340-41 (2d Cir. 1962).

the other issues which had been presented (*ibid.*), having stated at the outset of the opinion that "[w]hether or not [TWA's federal] complaint states a cause of action under the antitrust laws is a question we do not reach." (*id.* at 366).

Following remand, a judgment was duly entered by the district court in compliance with this Court's mandate, dismissing the complaint. TWA was concerned that the dismissal might erroneously be treated as an adjudication on the merits of its charges against its former controlling stockholder, in spite of the fact that this Court had plainly not reached those merits. It accordingly requested a specific notation that the dismissal was without prejudice to the pending Delaware action. Hon. Charles M. Metzner, the United States District Judge who had presided over the federal action since 1961, refused to make the notation in the judgment of dismissal. He was at pains to explain, however, that he considered such a notation to be unnecessary to safeguard plaintiff's rights. Judge Metzner's opinion—reported at 359 F.Supp. 783 [App. 39a *et seq.*]—is a clear specification of what the dismissal was intended to adjudicate, a specification entirely inconsistent with petitioners' argument. The federal claims were finally disposed of, since there was a final determination that petitioners are protected from liability under the antitrust laws by CAB orders. TWA's Delaware law claims of self-dealing, mismanagement and breach of fiduciary duty were not adjudicated because they had not been reached and tried. So the Delaware courts have held.

It is fortunate in the interest of justice to TWA and its more than 35,000 stockholders that, promptly after Toolco asserted this affirmative defense of CAB approval, TWA had instituted the present action to preserve its common

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law rights, before further delays could put them in jeopardy under principles of laches or limitation.*

ARGUMENT

The Delaware courts determined, after applying to the circumstances of this case the pertinent principles of *res judicata,* concerning which, as the Delaware Supreme Court noted, "there is little, if any, dispute" [App. 24a, 336 A.2d at 574], that TWA is entitled to its day in court on its common law claims against petitioners. The petition characterizes this decision as a "startling departure from, and * * * in direct conflict with, established principles" (Pet., p. 10). Nothing could be further from the truth. The right of each litigant to his day in court, which the decisions of the Delaware courts vindicate, is the first principle of our coordinate legal system in which the state and federal courts are not antagonists, but rather partners in protecting the rights of citizens. *Plaquemines Tropical Fruit Co.* v. *Henderson,* 170 U.S. 511 (1898); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.6[3] (2d ed. 1974). It is a principle which requires the special protection of the state courts in matters where the federal courts are without jurisdiction or decline to exercise it.

Cutting through the semantics of petitioners' arguments, the simple question is: must the Delaware courts be closed to TWA because the federal courts have held that they cannot grant TWA redress under the federal antitrust laws? The petition urges, under the several heads of *res judicata,* Fed. R. Civ. P. 41(b), the rule against splitting, and compulsory pendent federal jurisdiction over state law claims,

* Toolco's answer in the federal action was filed on February 14, 1962 (Del.App. A143-A200). The instant action was commenced on April 18, 1962 (Del.App. A7-A33).

that TWA, however clearly injured and uncompensated, must be barred from prosecuting its claims in the Delaware courts. The price of effectuating what petitioners call policies of "sound judicial administration" (Pet., p. 10) is to penalize TWA for having mistaken the forum in which it was entitled to seek relief. There would be nothing "sound" or just about a system of judicial administration which would thus discourage a litigant from seeking a federal forum by denying him relief anywhere else if his reasonable belief that the federal forum was available proves erroneous—particularly where, as here, the doctrines invoked in support of this result were developed by the courts many years after both the federal and state actions were filed.

The Delaware courts correctly applied the applicable doctrines of judicial finality

The true question presented by the petition is whether the Delaware courts accorded the federal judgment dismissing TWA's private antitrust action the finality required by the several doctrines of judicial finality upon which petitioners rely.* We submit that the Delaware courts properly applied each of these doctrines to the circumstances of this case.

1. *Res judicata.*

Simply put, the doctrine of *res judicata* provides that "a judgment 'on the merits' in a prior suit involving the

* As this Court held in *Stoll* v. *Gottlieb*, 305 U.S. 165, 170-71 (1938), the issue before the Delaware courts, although presenting a federal question, "was not one of full faith and credit." It is a question whether a state court has so misinterpreted the common law rules of judicial finality when applied to a federal judgment as to violate the supremacy clause.

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same parties or their privies bars a second suit based on the same cause of action." *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955). "The requirement that a judgment, to be *res judicata*, must be rendered 'on the merits' guarantees to every plaintiff the right once to be heard on the substance of his claim." *Saylor* v. *Lindsley*, 391 F.2d 965, 968 (2d Cir. 1968). *See also Menendez* v. *Saks & Co.*, 485 F.2d 1355, 1364 (2d Cir. 1973), *cert. granted as to other issues sub nom. Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 416 U.S. 981 (1974) ("The doctrine of *res judicata* is subject to the overriding public policy that 'a party must not be deprived of an actual opportunity to be heard.'"); *La Societe Anonyme des Parfums Le Galion* v. *Jean Patou, Inc.*, 495 F.2d 1265 (2d Cir. 1974).

In directing dismissal of TWA's federal action, this Court made it plain that it was not ruling on the substance of TWA's claim for redress for the injuries inflicted on it:

> "The short of it is that in our view §§ 408 and 414 of the Act, as construed in *Pan American*, require reversal of the Court of Appeals and dismissal of this action. What TWA charged in its complaint was no more than the kind of conduct the CAB in 1950 had approved and authorized for the future; and, in any event, such conduct was within the power of the Board to control and was central to the mandate of § 408 to permit control of TWA by Toolco only if consistent with the public interest.
>
> "We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. *Pan American*, 371 U.S., at 305. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where the CAB specifically authorizes as in the public interest specific

transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

"This conclusion necessitates a dismissal of the cross-petition, a reversal of the judgment below, and a remand with directions to dismiss the complaint, *as the numerous other points briefed and argued become irrelevant in that posture of the litigation.*" (409 U.S. at 388-89; emphasis added.)

As the Delaware Supreme Court held, the dismissal of TWA's federal complaint, then, was "on the merits" only in the sense that TWA's right of access to the federal courts to vindicate a federal right under the antitrust laws has been finally determined against TWA [App. 25a-26a, 336 A.2d at 575]. The CAB orders had the effect of conferring upon petitioners immunity from such an action. The issues raised in the instant petition, however, were explicitly not passed upon by this Court. It was therefore the duty of the Delaware courts to apply established doctrines of *res judicata* to determine if a judgment of dismissal bottomed on petitioners' immunity from suit under the antitrust laws had the collateral effect of barring TWA's state claims. The Delaware courts correctly applied the pertinent principles and authorized this case to proceed.

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The cases dealing with *res judicata* demonstrate that a dismissal based upon the ground decided by this Court is "jurisdictional" in the broad sense of the term, *Costello* v. *United States*, 365 U.S. 265, 285 (1961), rather than a judgment "on the merits." For example, in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), a final judgment on a cross-claim against the United States as representative for certain Indian Nations had previously been entered in a receivership proceeding in the Western District of Missouri. No appeal was ever taken from this judgment, entered in proceedings in which the parties were represented and in which the issues were apparently fully adjudicated. Yet this Court held that the prior judgment could not be *res judicata* in a later action, brought in the Eastern District of Oklahoma, because it had represented an adjudication of claims against which the United States was immune, and as to which the Indian Nations could be sued only in "any United States court in the Indian Territory." 309 U.S. at 513. The action taken by the Missouri district court, the Court said, had been "beyond its jurisdiction." The question whether the cross-claimants actually had a valid claim against the Indian Nations should be decided in further proceedings. 309 U.S. at 515-16. *A fortiori*, had the Missouri district court properly dismissed the earlier cross-claim on the ground that the United States was immune to such an action, that decision clearly would not have barred a subsequent claim on the same ground in the proper tribunal.

That precise question was involved in *American Guaranty Corp.* v. *United States*, 401 F.2d 1004, 1005 (Ct. Cl. 1968), in which the plaintiff sought to recover certain fees that it had deposited in the bankruptcy court during a proceeding for an arrangement under Chapter XI. A prior attempt by the same plaintiff to recover such funds, which

were in the custody of the United States, had been rejected on the ground of sovereign immunity. Terming the prior dismissal a decision on "jurisdictional" grounds, the Court of Claims held that the plaintiff was not barred or estopped by the doctrine of *res judicata*.*

The essence of the rule is that where the prior dismissal was based on a ruling that the doors of a particular jurisdiction were closed to the plaintiff, it does not bar a second action in a forum that provides a remedy. A case like *United States* v. *California & Oregon Land Co.*, 192 U.S. 355 (1904), cited by petitioners (Pet., pp. 11-12, 14), is therefore irrelevant. In that case the ultimate issue sought to be presented to the second court—whether the United States or the California & Oregon Land Co. should have title to certain land—was identical to the ultimate issue before the first court and the first court had reached and determined it.**

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* In numerous other cases where an action has been dismissed because of the court's inability to grant a remedy, the dismissal has also been viewed as not being "on the merits". *See, e.g., Luker* v. *Nelson*, 341 F.Supp. 111, 114-15 (N.D. Ill. 1972); *Thommen* v. *Consolidated Freightways*, 234 F.Supp. 472 (D. Ore. 1964); *Kipbea Baking Co.* v. *Strauss*, 218 F.Supp. 696, 698-99 (E.D.N.Y. 1963).

** The other cases upon which petitioners rely also involved situations in which the party against which *res judicata* was held to operate had *actually* had his day in court and lost on the merits of his claim. *See, e.g., Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 295 F.2d 362, 364 (5th Cir. 1961) ("appellant has had its day in court"); *Grace* v. *Grace*, 394 F.2d 127, 128 (2d Cir. 1968) ("Having lost in the State courts, plaintiff commenced this federal diversity proceeding making essentially the same claims * * * that he had made before the Surrogate." An examination of the decisions in the *Grace* litigation demonstrates that the state court dismissal in question was comparable to the dismissal of Toolco's counterclaims in the federal action); *C&C Products, Inc.* v. *Fidelity & Deposit Co.*, 512 F.2d 1375 (5th Cir. 1975) (dispositive issue fully litigated on merits in prior action).

Petitioners' suggestion that the dismissal of TWA's federal action was "upon the facts" developed at the damage hearing

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In the instant case, on the contrary, the issue determined by the dismissal of the federal action was whether TWA could recover for injuries suffered because of violations of the antitrust laws, while the issue presented to the Delaware courts is whether TWA could recover for injuries suffered by reason of petitioners' breaches of fiduciary duty to TWA and its minority stockholders. The latter issue was not presented to or decided by this Court in directing dismissal of TWA's antitrust action. As to the ultimate issue in both cases—the central issue if the end to be sought is a just determination of the dispute—whether TWA was in fact injured by petitioners' actions, that issue *was* presented to this Court, which expressly refused to pass on it. The lower federal courts, of course, had determined that ultimate issue in TWA's favor.

2. *Rule 41(b).*

The emptiness of petitioners' charge that the Delaware courts "refused to apply" Rule 41(b) of the Federal Rules of Civil Procedure (Pet., p. 12) is demonstrated by the treatment of Rule 41(b) in the opinions below [App. 11a-13a, 317 A.2d at 120-21; App. 26a-28a, 336 A.2d at 575-76]. Petitioners' real complaint is that the Delaware courts

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after this Court's initial refusal to review the denial of Toolco's motion to dismiss in 1965 (Pet., pp. 6, 13) is refuted by quotation in full of the very paragraph of the dissenting opinion by Mr. Chief Justice Burger upon which they rely:

> "But when parties to litigation reach that stage and the Court fails to respond with a decision on the merits, lawyers read that as a signal that the case should proceed. These parties did so—for nine years and more than 15 million dollars in legal expense—only to be told by the Court now that on the facts there is no legal liability—the very issue that could as well have been decided in 1964 as today. All of the litigation since 1964 has been confined to the massive task of determining damages and *it will not do to say that the Court could not resolve the legal issues until damages were ascertained. Precisely the contrary is true.*" (409 U.S. at 411-12; emphasis added.)

properly refused to transform the procedural guide which Rule 41(b) provides in construing federal court judgments into a rule of substantive law contrary to the express provision of the enabling act, 28 U.S.C. § 2072.*

In applying Rule 41(b) to this case, the Delaware courts did exactly what the Court of Appeals for the Second Circuit directed in *La Societe Anonyme des Parfums Le Galion* v. *Jean Patou, Inc.*, 495 F.2d 1265, 1275 n. 12 (2d Cir. 1974). Indeed this is an *a fortiori* case for the approach suggested in *Le Galion*. Here there was more than just "some evidence" that the dismissal may have been intended to be without prejudice (495 F.2d at 1275). TWA, in order to permit the district court to consider the non-preclusive effect of the dismissal and perhaps embody it in the formal language of the judgment of dismissal, applied to it for entry of a judgment which would expressly state that the dismissal was without prejudice to TWA's Delaware law claims. Judge Metzner denied TWA's application on the ground that he did not believe it necessary to go beyond the express terms of this Court's mandate in order to protect TWA's right to prosecute its non-federal claims [App. 39a *et seq.*, 359 F.Supp. 783].

Judge Metzner wrote:

> "It is clear that under Rule 41(b) a dismissal of the complaint, certainly as far as the federal claims are concerned, would be upon the merits. However, it does not follow that such a dismissal would be a bar to the non-federal claims. In the *Calderone* case, *supra*, [**]

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* The Delaware courts are not strangers to the principle embodied in Fed.R.Civ.P. 41(b), since, as the Delaware Supreme Court noted [App. 27a, 336 A.2d at 575], it is identical to Delaware Chancery Rule 41(b).

** *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

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the complaint alleged federal claims and pendent state claims. The federal claims were dismissed on motion for failure to state a claim. The court pointed out that this action did not leave the plaintiff without remedy:

"'Since the federally-based claims were properly dismissed prior to trial, however, the pendent state claims must also be dismissed and the plaintiff relegated to the state courts for relief.' 454 F.2d at 1297. Interestingly enough, the order entered in that case did not dismiss the pendent claims without prejudice. I gather from this that such a safeguard is not necessary to protect whatever rights plaintiff may have in this regard. It might also be argued that, standing alone, the court is without jurisdiction of the state claims and thus the dismissal is for lack of subject matter jurisdiction which is not on the merits under Rule 41(b).

"Finally, a reading of the Supreme Court opinion clearly indicates the issue that was before the Court if a claim is ever made in the state court that the judgment to be entered here is a bar to that action.

"This court is obviously reluctant to amend the mandate of the Supreme Court, especially when there is doubt that such action is necessary to protect the interests of the parties. * * *" [App. 42a-43a, 359 F.Supp. at 785]

Rule 41(b), as is plain from its terms, provides a rule of construction in those circumstances where there is no other evidence of a federal court's intention in entering a judgment of dismissal. Where, as the Rule states, "the court in its order for dismissal otherwise specifies," it is necessary to turn to the court's order and opinion, if any, to determine whether the dismissal is "with prejudice" in the sense of "on

the merits." It is significant that Rule 41(b) does not direct the inquiry to the "judgment of dismissal," which under federal practice must be a separate document, Fed. R. Civ. P. 58, but to the court's "order for dismissal."

Rule 41(b) expressly reserves to the court the right to determine the extent to which a given judgment should be treated as being with or without prejudice. The above-quoted explanation provided by the district court was such a specification, which the Delaware courts were entitled to consider in applying Rule 41(b) to the federal dismissal.

It would truly be, in the words of the Court of Appeals in *Le Galion, supra,* "unduly harsh" to hold that Rule 41(b) foreclosed the Delaware courts from evaluating the federal court's intention in entering the judgment of dismissal. If, as it now appears, petitioners were not satisfied with the district court's decision, it was incumbent upon them (and not upon TWA, as they now facilely suggest) to have appealed from that decision or to have invoked the federal court's powers under the Anti-Injunction Act, 28 U.S.C. § 2283, which they discuss (Pet., pp. 3-4).

3. *Rule against splitting.*

The petition only once refers in terms to the rule against splitting a single cause of action (Pet., pp. 14-15). However, reliance upon that rule is fundamental to the entire petition and forms an essential bridge to petitioners' principal argument: that TWA was bound to have joined its Delaware law claims in the federal action on a theory of pendent federal jurisdiction but did not do so, and consequently TWA must be barred from prosecuting those claims in the Delaware courts. As we show hereafter, petitioners' argument depends upon an erroneous view of the doctrine of pendent jurisdiction. Even if their jurisdic-

tional analysis were correct, however, their knowing waiver of their right to assert such a defense while the federal action was still pending precludes them from raising it now after they have succeeded in having the federal action dismissed.

The rule against splitting a cause of action is primarily designed to protect a defendant from a multiplicity of suits, and a defendant may agree to a splitting of the cause of action or may by his conduct be held to have waived his right to insist upon application of the rule. *See* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.410[2] (2d ed. 1974). Such a waiver will be presumed unless the defense of another pending action is timely and properly asserted. *See, e.g., Weekes* v. *Atlantic National Insurance Co.*, 370 F.2d 264, 270-72 (9th Cir. 1966); *Todd* v. *Central Petroleum Co.*, 155 Kan. 249, 124 P.2d 704 (1942); *Georgia Railway & Power Co.* v. *Endsley*, 167 Ga. 439, 145 S.E. 851, 854 (1928); *see generally, Annot., Waiver of, by Failing to Promptly Raise, Objection to Splitting Cause of Action*, 40 A.L.R.3d 108 (1971). This is but a specific instance of the general rule that the beneficiary of such judicial doctrines of finality may knowingly waive his rights thereunder. *Leonard* v. *Vicksburg, Shreveport & Pacific RR.*, 198 U.S. 416, 422-23 (1905).

This exception to the rule against splitting a cause of action is strongly endorsed in RESTATEMENT (SECOND) OF JUDGMENTS, Ch. 3 (Tent. Dr. No. 1, 1973), in § 61.2(1)(a), which provides:

> "(1) When any of the following circumstances exists, the general rule of § 61 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

> "(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; * * *." (p. 123)

The Comment on this section further elucidates the exception:

> "a. *Consent to or acquiescence in splitting.* A main purpose of the general rule stated in § 61 is to protect the defendant from being harassed by repetitive actions based on the same claim. The rule is thus not applicable where the defendant consents, in express words or otherwise, to the splitting of the claim.
>
> * * *
>
> "Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. *The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.*" (pp. 125-26; emphasis added.)*

The instant case is an *a fortiori* situation for application of this exception, since petitioners expressly acknowledged that they had considered putting forward the defense of the rule against splitting a cause of action, but decided

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* Compare RESTATEMENT OF JUDGMENTS § 62(c) and Comment (1942).

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against doing so.* At a hearing held on July 10, 1963, while discussing whether discovery proceedings should continue in the Court of Chancery in light of the entry of an interlocutory default judgment by the federal district court in New York, counsel for petitioners made their strategy plain. Acknowledging that petitioners might have brought a motion to dismiss the proceedings in Delaware based upon the pendency of the federal action, petitioners' counsel stated:

> "But had we taken this step we would have been confronted with a possible inequitable result because while I believe we are entitled to seek an order dismissing this entire proceeding in the light of this final judgment which has been entered in New York, it would be inequitable to do so while there is a possibility of reversal.
>
> "It would require the parties, in the event of a reversal, to start over again. There are statute of limitation questions.
>
> "Therefore we believe that the equitable way of proceeding is to stay all further proceedings here until such time as the time when the Court of Appeals has acted, however it will act, and at that time there may or there may not be some other questions to be litigated, in Delaware or wherever else these parties may choose to go." [TWA App. A22-A23]

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* Pendency of the federal action was clearly an affirmative defense, and Rule 8(c) of the Rules of the Delaware Court of Chancery requires all affirmative defenses to be pleaded. Petitioners' failure to do so for more than a decade not only constituted a waiver under Chancery Rule 12(h) as it read in 1962 and for many years thereafter, 13 DEL. CODE. ANN. (1953), but in light of the record of the 1963 proceedings must be held to have been a knowing and intentional waiver of the legal position belatedly asserted in their 1973 motion. *Weekes* v. *Atlantic National Insurance Co., supra,* 370 F.2d at 271.

Petitioners' counsel also stated:

> "To be sure, because of jurisdictional questions which are raised in the New York action, it could happen, depending upon what the Court of Appeals does, that there could be left some issues to be tried in the Delaware action." [TWA App. A15]

The Delaware courts have now determined that this action should proceed, with the express reservation of the question whether any particular issues were finally determined in the federal action [App. 35a, 336 A.2d at 579]. Petitioners are complaining of nothing more than having been taken at their word.

4. *Pendent federal jurisdiction.*

Probably because they are aware that the Delaware courts correctly applied the pertinent doctrines of finality in the unique circumstances of this case, petitioners' principal effort is to try to convince this Court that TWA was bound to have pleaded its Delaware law claims in the federal action filed in 1961 or be deprived of all rights to assert those claims elsewhere—a theory that can only be called compulsory pendent federal jurisdiction.

At a time when this Court and the lower federal courts have expressed growing concern for the nearly impossible burdens imposed on the federal judicial system by the number of essentially state-oriented disputes which are being brought in federal court, petitioners' interpretation of this Court's landmark decision in *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), hardly seems a preferable one, even if the *Gibbs* case would bear such a reading—which, we submit, it does not.

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Although *Gibbs* greatly broadened what had been up to then understood to be the scope of a federal court's *power* under the doctrine of pendent jurisdiction, it did so explicitly in terms of a federal court's discretion to exercise that power. Indeed, with respect to a dismissal such as occurred in TWA's federal action, this Court stated that the power should *not* be exercised:

> "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. * * * *Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.*" (383 U.S. 726; emphasis added.)

Thus *Gibbs* emphasizes that the power of the federal court to entertain a state claim in the absence of diversity is a discretionary power, and one moreover that should *not* be used when, as here, the federal claims are dismissed before trial.* It would be perverse indeed to deduce from *Gibbs* a mandatory requirement that a complainant such as TWA, if it presses a federal claim at all, must bring all state claims also in the federal court, which might

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* Both before and after *Gibbs*, courts recognized that this was a critical test to be passed before a federal court *should* assume to exercise pendent jurisdiction over state law claims, in situations where the naked power to do so was thought to exist. *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497, 501 (1st Cir. 1950); *O'Neill* v. *Maytag*, 339 F.2d 764 (2d Cir. 1964); *T. B. Harms Co.* v. *Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). Recent refinements of the *Gibbs* rule where this Court has found special justification for accepting jurisdiction over pendent claims, *e.g.*, *Hagans* v. *Lavine*, 415 U.S. 528 (1974) (pendent federal law claim), do not signal a departure from the essential thrust of *Gibbs*.

or might not hear them, instead of in the state court which has both unquestioned jurisdiction and the duty to exercise it.

In early 1962 Toolco's claim of immunity to the antitrust action because of CAB orders had been raised by motion and by answer. It seemed certain that the sufficiency of this defense would be determined before any trial of the merits—as in fact occurred, although only after delays not anticipated by the parties. Under the case law as it then stood, which in this respect was not altered by *Gibbs*, it appeared that if this defense should be upheld any pendent state claims would be dismissed and left to the state courts to determine—yet a state court action brought thereafter might be barred by limitations or laches. By filing the instant action in the Delaware courts TWA sought protection against finding out that Toolco's CAB defense precluded an antitrust action too late to seek a state court remedy. In view of the actual outcome of the federal action, to argue that the state court action is barred anyway because it could have been heard in federal court had the CAB defense *not* been determined until after a trial on the merits is to distort utterly the teaching of *Gibbs*.

Even if petitioners were correct that a collateral result of *Gibbs* is to create some form of compulsory pendent federal jurisdiction, requiring all claims arising out of the same factual situation to be brought in federal court if one is brought there, whether or not the federal claim itself is disposed of before trial, the result in this case should not be affected.*

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* That such an estoppel rule "may ultimately result" is suggested in Note, *UMW* v. *Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 672 (1968). The very suggestion demonstrates its prior absence, and surely to apply such a rule retroactively to actions commenced before the *Gibbs* decision would be completely unjustified.

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TWA's federal action was filed in 1961, and it was not until five years after that that this Court in *Gibbs* reformulated the doctrine of pendent jurisdiction, expanding greatly the scope of its permissible exercise over that generally recognized in prior years, when courts and litigants relied upon the teaching of *Hurn* v. *Oursler*, 289 U.S. 238 (1933). 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3567, at p. 443 (1975) ("It would be unprofitable to examine the problems in applying Hurn * * *, since [*Gibbs*] changed the law in this area so significantly that pre-1966 cases are now of historical interest only."); Note, *UMW* v. *Gibbs and Pendent Jurisdiction*, 81 HARV.L.REV. 657 (1968).

TWA drafted its complaint under the guidance of *Hurn* and cases applying it.* Assuming *arguendo* that under

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* The rule announced in *Hurn* depended upon whether the same "cause of action" was involved in the two claims. After pointing out as significant the "identical facts" involved in certain claims for copyright infringement and unfair competition, the Court in *Hurn* mentioned that identity of facts was not the only criterion (289 U.S. at 246). It quoted with approval the definition embodied in the following statement from *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 321 (1927):

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong."

In these terms, TWA's right to be free from injury to its business or property as a result of violations of the antitrust laws can hardly be argued to have been the same as its right to be free from petitioners' self-dealing, misappropriation of corporate opportunities and breaches of fiduciary duty. *Compare Williamson* v. *Columbia Gas & Electric Corp.*, 186 F.2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951), upon which petitioners rely (Pet., pp. 12, 13-14), where the Court of Appeals stated:

> "Thus we have two actions pending by the same plaintiff against the same defendant in the same court, each involving

some circumstances the huge scope of the discretionary pendent federal jurisdiction as defined in *Gibbs* might be compulsory upon a would-be federal plaintiff, it would be wholly inappropriate to read into *Gibbs* some 14 years later a retroactive effect that would "* * * deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 108 (1971).

The Delaware courts concluded that TWA is entitled to its day in court on its common law claims against petitioners. We submit that in law and as a matter of simple justice that conclusion is fully justified.

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a suit for recovery of injuries alleged to have been sustained by action on the part of the defendant in violation of the anti-trust laws of the United States." (186 F.2d at 465-66)

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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